

111TH CONGRESS
1ST SESSION

S. 1584

To prohibit employment discrimination on the basis of sexual orientation
or gender identity.

IN THE SENATE OF THE UNITED STATES

AUGUST 5, 2009

Mr. MERKLEY (for himself, Ms. COLLINS, Mr. KENNEDY, Ms. SNOWE, Mr. AKAKA, Mr. BINGAMAN, Mrs. BOXER, Mr. BROWN, Mr. BURRIS, Ms. CANTWELL, Mr. CARDIN, Mr. CASEY, Mr. DODD, Mr. DURBIN, Mr. FEINGOLD, Mrs. FEINSTEIN, Mr. FRANKEN, Mrs. GILLIBRAND, Mr. HARKIN, Mr. INOUE, Mr. KERRY, Ms. KLOBUCHAR, Mr. KOHL, Mr. LAUTENBERG, Mr. LEAHY, Mr. LEVIN, Mr. LIEBERMAN, Mr. MENENDEZ, Ms. MIKULSKI, Mrs. MURRAY, Mr. REED, Mr. SANDERS, Mr. SCHUMER, Mrs. SHAHEEN, Mr. SPECTER, Mr. UDALL of Colorado, Mr. UDALL of New Mexico, Mr. WHITEHOUSE, and Mr. WYDEN) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To prohibit employment discrimination on the basis of sexual
orientation or gender identity.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Employment Non-Dis-
5 crimination Act of 2009”.

1 **SEC. 2. PURPOSES.**

2 The purposes of this Act are—

3 (1) to address the history and widespread pat-
4 tern of discrimination on the basis of sexual orienta-
5 tion or gender identity by private sector employers
6 and local, State, and Federal government employers;

7 (2) to provide a comprehensive Federal prohibi-
8 tion of employment discrimination on the basis of
9 sexual orientation or gender identity, including
10 meaningful and effective remedies for any such dis-
11 crimination; and

12 (3) to invoke congressional powers, including
13 the powers to enforce the 14th Amendment to the
14 Constitution, and to regulate interstate commerce
15 and provide for the general welfare pursuant to sec-
16 tion 8 of article I of the Constitution, in order to
17 prohibit employment discrimination on the basis of
18 sexual orientation or gender identity.

19 **SEC. 3. DEFINITIONS.**

20 (a) IN GENERAL.—In this Act:

21 (1) COMMISSION.—The term “Commission”
22 means the Equal Employment Opportunity Commis-
23 sion.

24 (2) COVERED ENTITY.—The term “covered en-
25 tity” means an employer, employment agency, labor
26 organization, or joint labor-management committee.

1 (3) EMPLOYEE.—

2 (A) IN GENERAL.—The term “employee”
3 means—

4 (i) an employee as defined in section
5 701(f) of the Civil Rights Act of 1964 (42
6 U.S.C. 2000e(f));

7 (ii) a State employee to which section
8 302(a)(1) of the Government Employee
9 Rights Act of 1991 (42 U.S.C. 2000e–
10 16b(a)(1)) applies;

11 (iii) a covered employee, as defined in
12 section 101 of the Congressional Account-
13 ability Act of 1995 (2 U.S.C. 1301) or sec-
14 tion 411(c) of title 3, United States Code;
15 or

16 (iv) an employee or applicant to which
17 section 717(a) of the Civil Rights Act of
18 1964 (42 U.S.C. 2000e–16(a)) applies.

19 (B) EXCEPTION.—The provisions of this
20 Act that apply to an employee or individual
21 shall not apply to a volunteer who receives no
22 compensation.

23 (4) EMPLOYER.—The term “employer”
24 means—

1 (A) a person engaged in an industry affect-
2 ing commerce (as defined in section 701(h) of
3 the Civil Rights Act of 1964 (42 U.S.C.
4 2000e(h)) who has 15 or more employees (as
5 defined in subparagraphs (A)(i) and (B) of
6 paragraph (3)) for each working day in each of
7 20 or more calendar weeks in the current or
8 preceding calendar year, and any agent of such
9 a person, but does not include a bona fide pri-
10 vate membership club (other than a labor orga-
11 nization) that is exempt from taxation under
12 section 501(c) of the Internal Revenue Code of
13 1986;

14 (B) an employing authority to which sec-
15 tion 302(a)(1) of the Government Employee
16 Rights Act of 1991 applies;

17 (C) an employing office, as defined in sec-
18 tion 101 of the Congressional Accountability
19 Act of 1995 or section 411(c) of title 3, United
20 States Code; or

21 (D) an entity to which section 717(a) of
22 the Civil Rights Act of 1964 applies.

23 (5) EMPLOYMENT AGENCY.—The term “em-
24 ployment agency” has the meaning given the term in

1 section 701(c) of the Civil Rights Act of 1964 (42
2 U.S.C. 2000e(c)).

3 (6) GENDER IDENTITY.—The term “gender
4 identity” means the gender-related identity, appear-
5 ance, or mannerisms or other gender-related charac-
6 teristics of an individual, with or without regard to
7 the individual’s designated sex at birth.

8 (7) LABOR ORGANIZATION.—The term “labor
9 organization” has the meaning given the term in
10 section 701(d) of the Civil Rights Act of 1964 (42
11 U.S.C. 2000e(d)).

12 (8) PERSON.—The term “person” has the
13 meaning given the term in section 701(a) of the
14 Civil Rights Act of 1964 (42 U.S.C. 2000e(a)).

15 (9) SEXUAL ORIENTATION.—The term “sexual
16 orientation” means homosexuality, heterosexuality,
17 or bisexuality.

18 (10) STATE.—The term “State” has the mean-
19 ing given the term in section 701(i) of the Civil
20 Rights Act of 1964 (42 U.S.C. 2000e(i)).

21 (b) APPLICATION OF DEFINITIONS.—For purposes of
22 this section, a reference in section 701 of the Civil Rights
23 Act of 1964—

24 (1) to an employee or an employer shall be con-
25 sidered to refer to an employee (as defined in sub-

1 section (a)(3)) or an employer (as defined in sub-
 2 section (a)(4)), respectively, except as provided in
 3 paragraph (2) of this subsection; and

4 (2) to an employer in subsection (f) of that sec-
 5 tion shall be considered to refer to an employer (as
 6 defined in subsection (a)(4)(A)).

7 **SEC. 4. EMPLOYMENT DISCRIMINATION PROHIBITED.**

8 (a) EMPLOYER PRACTICES.—It shall be an unlawful
 9 employment practice for an employer—

10 (1) to fail or refuse to hire or to discharge any
 11 individual, or otherwise discriminate against any in-
 12 dividual with respect to the compensation, terms,
 13 conditions, or privileges of employment of the indi-
 14 vidual, because of such individual's actual or per-
 15 ceived sexual orientation or gender identity; or

16 (2) to limit, segregate, or classify the employees
 17 or applicants for employment of the employer in any
 18 way that would deprive or tend to deprive any indi-
 19 vidual of employment or otherwise adversely affect
 20 the status of the individual as an employee, because
 21 of such individual's actual or perceived sexual ori-
 22 entation or gender identity.

23 (b) EMPLOYMENT AGENCY PRACTICES.—It shall be
 24 an unlawful employment practice for an employment agen-
 25 cy to fail or refuse to refer for employment, or otherwise

1 to discriminate against, any individual because of the ac-
2 tual or perceived sexual orientation or gender identity of
3 the individual or to classify or refer for employment any
4 individual on the basis of the actual or perceived sexual
5 orientation or gender identity of the individual.

6 (c) LABOR ORGANIZATION PRACTICES.—It shall be
7 an unlawful employment practice for a labor organiza-
8 tion—

9 (1) to exclude or to expel from its membership,
10 or otherwise to discriminate against, any individual
11 because of the actual or perceived sexual orientation
12 or gender identity of the individual;

13 (2) to limit, segregate, or classify its member-
14 ship or applicants for membership, or to classify or
15 fail or refuse to refer for employment any individual,
16 in any way that would deprive or tend to deprive any
17 individual of employment, or would limit such em-
18 ployment or otherwise adversely affect the status of
19 the individual as an employee or as an applicant for
20 employment because of such individual's actual or
21 perceived sexual orientation or gender identity; or

22 (3) to cause or attempt to cause an employer to
23 discriminate against an individual in violation of this
24 section.

1 (d) TRAINING PROGRAMS.—It shall be an unlawful
2 employment practice for any employer, labor organization,
3 or joint labor-management committee controlling appren-
4 ticeship or other training or retraining, including on-the-
5 job training programs, to discriminate against any indi-
6 vidual because of the actual or perceived sexual orientation
7 or gender identity of the individual in admission to, or em-
8 ployment in, any program established to provide appren-
9 ticeship or other training.

10 (e) ASSOCIATION.—An unlawful employment practice
11 described in any of subsections (a) through (d) shall be
12 considered to include an action described in that sub-
13 section, taken against an individual based on the actual
14 or perceived sexual orientation or gender identity of a per-
15 son with whom the individual associates or has associated.

16 (f) NO PREFERENTIAL TREATMENT OR QUOTAS.—
17 Nothing in this Act shall be construed or interpreted to
18 require or permit—

19 (1) any covered entity to grant preferential
20 treatment to any individual or to any group because
21 of the actual or perceived sexual orientation or gen-
22 der identity of such individual or group on account
23 of an imbalance which may exist with respect to the
24 total number or percentage of persons of any actual
25 or perceived sexual orientation or gender identity

1 employed by any employer, referred or classified for
 2 employment by any employment agency or labor or-
 3 ganization, admitted to membership or classified by
 4 any labor organization, or admitted to, or employed
 5 in, any apprenticeship or other training program, in
 6 comparison with the total number or percentage of
 7 persons of such actual or perceived sexual orienta-
 8 tion or gender identity in any community, State, sec-
 9 tion, or other area, or in the available work force in
 10 any community, State, section, or other area; or

11 (2) the adoption or implementation by a cov-
 12 ered entity of a quota on the basis of actual or per-
 13 ceived sexual orientation or gender identity.

14 (g) DISPARATE IMPACT.—Only disparate treatment
 15 claims may be brought under this Act.

16 **SEC. 5. RETALIATION PROHIBITED.**

17 It shall be an unlawful employment practice for a cov-
 18 ered entity to discriminate against an individual because
 19 such individual—

20 (1) opposed any practice made an unlawful em-
 21 ployment practice by this Act; or

22 (2) made a charge, testified, assisted, or partici-
 23 pated in any manner in an investigation, proceeding,
 24 or hearing under this Act.

1 **SEC. 6. EXEMPTION FOR RELIGIOUS ORGANIZATIONS.**

2 This Act shall not apply to a corporation, association,
3 educational institution or institution of learning, or society
4 that is exempt from the religious discrimination provisions
5 of title VII of the Civil Rights Act of 1964 pursuant (42
6 U.S.C. 2000e et seq.) to section 702(a) or 703(e)(2) of
7 such Act (42 U.S.C. 2000e–1(a), 2000e–2(e)(2)).

8 **SEC. 7. NONAPPLICATION TO MEMBERS OF THE ARMED**
9 **FORCES; VETERANS' PREFERENCES.**

10 (a) ARMED FORCES.—

11 (1) EMPLOYMENT.—In this Act, the term “em-
12 ployment” does not apply to the relationship be-
13 tween the United States and members of the Armed
14 Forces.

15 (2) ARMED FORCES.—In paragraph (1) the
16 term “Armed Forces” means the Army, Navy, Air
17 Force, Marine Corps, and Coast Guard.

18 (b) VETERANS' PREFERENCES.—This title does not
19 repeal or modify any Federal, State, territorial, or local
20 law creating a special right or preference concerning em-
21 ployment for a veteran.

22 **SEC. 8. CONSTRUCTION.**

23 (a) EMPLOYER RULES AND POLICIES.—

24 (1) IN GENERAL.—Nothing in this Act shall be
25 construed to prohibit a covered entity from enforcing
26 rules and policies that do not intentionally cir-

1 cumvent the purposes of this Act, if the rules or
2 policies are designed for, and uniformly applied to,
3 all individuals regardless of actual or perceived sex-
4 ual orientation or gender identity.

5 (2) SEXUAL HARASSMENT.—Nothing in this
6 Act shall be construed to limit a covered entity from
7 taking adverse action against an individual because
8 of a charge of sexual harassment against that indi-
9 vidual, provided that rules and policies on sexual
10 harassment, including when adverse action is taken,
11 are designed for, and uniformly applied to, all indi-
12 viduals regardless of actual or perceived sexual ori-
13 entation or gender identity.

14 (3) CERTAIN SHARED FACILITIES.—Nothing in
15 this Act shall be construed to establish an unlawful
16 employment practice based on actual or perceived
17 gender identity due to the denial of access to shared
18 shower or dressing facilities in which being seen
19 unclothed is unavoidable, provided that the employer
20 provides reasonable access to adequate facilities that
21 are not inconsistent with the employee's gender iden-
22 tity as established with the employer at the time of
23 employment or upon notification to the employer
24 that the employee has undergone or is undergoing
25 gender transition, whichever is later.

1 (4) ADDITIONAL FACILITIES NOT REQUIRED.—

2 Nothing in this Act shall be construed to require the
3 construction of new or additional facilities.

4 (5) DRESS AND GROOMING STANDARDS.—Noth-

5 ing in this Act shall prohibit an employer from re-
6 quiring an employee, during the employee’s hours at
7 work, to adhere to reasonable dress or grooming
8 standards not prohibited by other provisions of Fed-
9 eral, State, or local law, provided that the employer
10 permits any employee who has undergone gender
11 transition prior to the time of employment, and any
12 employee who has notified the employer that the em-
13 ployee has undergone or is undergoing gender tran-
14 sition after the time of employment, to adhere to the
15 same dress or grooming standards as apply for the
16 gender to which the employee has transitioned or is
17 transitioning.

18 (b) EMPLOYEE BENEFITS.—Nothing in this Act shall
19 be construed to require a covered entity to treat an unmar-
20 ried couple in the same manner as the covered entity
21 treats a married couple for purposes of employee benefits.

22 (c) DEFINITION OF MARRIAGE.—In this Act, the
23 term “married” refers to marriage as such term is defined
24 in section 7 of title 1, United States Code (commonly
25 known as the “Defense of Marriage Act”).

1 **SEC. 9. COLLECTION OF STATISTICS PROHIBITED.**

2 The Commission shall not collect statistics on actual
3 or perceived sexual orientation or gender identity from
4 covered entities, or compel the collection of such statistics
5 by covered entities.

6 **SEC. 10. ENFORCEMENT.**

7 (a) **ENFORCEMENT POWERS.**—With respect to the
8 administration and enforcement of this Act in the case of
9 a claim alleged by an individual for a violation of this
10 Act—

11 (1) the Commission shall have the same powers
12 as the Commission has to administer and enforce—

13 (A) title VII of the Civil Rights Act of
14 1964 (42 U.S.C. 2000e et seq.); or

15 (B) sections 302 and 304 of the Govern-
16 ment Employee Rights Act of 1991 (42 U.S.C.
17 2000e–16b and 2000e–16c),

18 in the case of a claim alleged by such individual for
19 a violation of such title, or of section 302(a)(1) of
20 the Government Employee Rights Act of 1991 (42
21 U.S.C. 2000e–16b(a)(1)), respectively;

22 (2) the Librarian of Congress shall have the
23 same powers as the Librarian of Congress has to ad-
24 minister and enforce title VII of the Civil Rights Act
25 of 1964 (42 U.S.C. 2000e et seq.) in the case of a

1 claim alleged by such individual for a violation of
2 such title;

3 (3) the Board (as defined in section 101 of the
4 Congressional Accountability Act of 1995 (2 U.S.C.
5 1301)) shall have the same powers as the Board has
6 to administer and enforce the Congressional Ac-
7 countability Act of 1995 (2 U.S.C. 1301 et seq.) in
8 the case of a claim alleged by such individual for a
9 violation of section 201(a)(1) of such Act (2 U.S.C.
10 1311(a)(1));

11 (4) the Attorney General shall have the same
12 powers as the Attorney General has to administer
13 and enforce—

14 (A) title VII of the Civil Rights Act of
15 1964 (42 U.S.C. 2000e et seq.); or

16 (B) sections 302 and 304 of the Govern-
17 ment Employee Rights Act of 1991 (42 U.S.C.
18 2000e–16b and 2000e–16c);

19 in the case of a claim alleged by such individual for
20 a violation of such title, or of section 302(a)(1) of
21 the Government Employee Rights Act of 1991 (42
22 U.S.C. 2000e–16b(a)(1)), respectively;

23 (5) the President, the Commission, and the
24 Merit Systems Protection Board shall have the same
25 powers as the President, the Commission, and the

1 Board, respectively, have to administer and enforce
2 chapter 5 of title 3, United States Code, in the case
3 of a claim alleged by such individual for a violation
4 of section 411 of such title; and

5 (6) a court of the United States shall have the
6 same jurisdiction and powers as the court has to en-
7 force—

8 (A) title VII of the Civil Rights Act of
9 1964 (42 U.S.C. 2000e et seq.) in the case of
10 a claim alleged by such individual for a viola-
11 tion of such title;

12 (B) sections 302 and 304 of the Govern-
13 ment Employee Rights Act of 1991 (42 U.S.C.
14 2000e–16b and 2000e–16c) in the case of a
15 claim alleged by such individual for a violation
16 of section 302(a)(1) of such Act (42 U.S.C.
17 2000e–16b(a)(1));

18 (C) the Congressional Accountability Act
19 of 1995 (2 U.S.C. 1301 et seq.) in the case of
20 a claim alleged by such individual for a viola-
21 tion of section 201(a)(1) of such Act (2 U.S.C.
22 1311(a)(1)); and

23 (D) chapter 5 of title 3, United States
24 Code, in the case of a claim alleged by such in-

1 dividual for a violation of section 411 of such
2 title.

3 (b) PROCEDURES AND REMEDIES.—The procedures
4 and remedies applicable to a claim alleged by an individual
5 for a violation of this Act are—

6 (1) the procedures and remedies applicable for
7 a violation of title VII of the Civil Rights Act of
8 1964 (42 U.S.C. 2000e et seq.) in the case of a
9 claim alleged by such individual for a violation of
10 such title;

11 (2) the procedures and remedies applicable for
12 a violation of section 302(a)(1) of the Government
13 Employee Rights Act of 1991 (42 U.S.C. 2000e–
14 16b(a)(1)) in the case of a claim alleged by such in-
15 dividual for a violation of such section;

16 (3) the procedures and remedies applicable for
17 a violation of section 201(a)(1) of the Congressional
18 Accountability Act of 1995 (2 U.S.C. 1311(a)(1)) in
19 the case of a claim alleged by such individual for a
20 violation of such section; and

21 (4) the procedures and remedies applicable for
22 a violation of section 411 of title 3, United States
23 Code, in the case of a claim alleged by such indi-
24 vidual for a violation of such section.

1 (c) OTHER APPLICABLE PROVISIONS.—With respect
 2 to a claim alleged by a covered employee (as defined in
 3 section 101 of the Congressional Accountability Act of
 4 1995 (2 U.S.C. 1301)) for a violation of this Act, title
 5 III of the Congressional Accountability Act of 1995 (2
 6 U.S.C. 1381 et seq.) shall apply in the same manner as
 7 such title applies with respect to a claim alleged by such
 8 a covered employee for a violation of section 201(a)(1) of
 9 such Act (2 U.S.C. 1311(a)(1)).

10 **SEC. 11. STATE AND FEDERAL IMMUNITY.**

11 (a) ABROGATION OF STATE IMMUNITY.—A State
 12 shall not be immune under the 11th Amendment to the
 13 Constitution from a suit brought in a Federal court of
 14 competent jurisdiction for a violation of this Act.

15 (b) WAIVER OF STATE IMMUNITY.—

16 (1) IN GENERAL.—

17 (A) WAIVER.—A State’s receipt or use of
 18 Federal financial assistance for any program or
 19 activity of a State shall constitute a waiver of
 20 sovereign immunity, under the 11th Amend-
 21 ment to the Constitution or otherwise, to a suit
 22 brought by an employee or applicant for em-
 23 ployment of that program or activity under this
 24 Act for a remedy authorized under subsection
 25 (d).

1 (B) DEFINITION.—In this paragraph, the
 2 term “program or activity” has the meaning
 3 given the term in section 606 of the Civil
 4 Rights Act of 1964 (42 U.S.C. 2000d–4a).

5 (2) EFFECTIVE DATE.—With respect to a par-
 6 ticular program or activity, paragraph (1) applies to
 7 conduct occurring on or after the day, after the date
 8 of enactment of this Act, on which a State first re-
 9 ceives or uses Federal financial assistance for that
 10 program or activity.

11 (c) REMEDIES AGAINST STATE OFFICIALS.—An offi-
 12 cial of a State may be sued in the official capacity of the
 13 official by any employee or applicant for employment who
 14 has complied with the applicable procedures of section 10,
 15 for equitable relief that is authorized under this Act. In
 16 such a suit the court may award to the prevailing party
 17 those costs authorized by section 722 of the Revised Stat-
 18 utes (42 U.S.C. 1988).

19 (d) REMEDIES AGAINST THE UNITED STATES AND
 20 THE STATES.—Notwithstanding any other provision of
 21 this Act, in an action or administrative proceeding against
 22 the United States or a State for a violation of this Act,
 23 remedies (including remedies at law and in equity, and
 24 interest) are available for the violation to the same extent
 25 as the remedies are available for a violation of title VII

1 of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.)

2 by a private entity, except that—

3 (1) punitive damages are not available; and

4 (2) compensatory damages are available to the
5 extent specified in section 1977A(b) of the Revised
6 Statutes (42 U.S.C. 1981a(b)).

7 **SEC. 12. ATTORNEYS' FEES.**

8 Notwithstanding any other provision of this Act, in
9 an action or administrative proceeding for a violation of
10 this Act, an entity described in section 10(a) (other than
11 paragraph (4) of such section), in the discretion of the
12 entity, may allow the prevailing party, other than the
13 Commission or the United States, a reasonable attorney's
14 fee (including expert fees) as part of the costs. The Com-
15 mission and the United States shall be liable for the costs
16 to the same extent as a private person.

17 **SEC. 13. POSTING NOTICES.**

18 A covered entity who is required to post notices de-
19 scribed in section 711 of the Civil Rights Act of 1964 (42
20 U.S.C. 2000e–10) shall post notices for employees, appli-
21 cants for employment, and members, to whom the provi-
22 sions specified in section 10(b) apply, that describe the
23 applicable provisions of this Act in the manner prescribed
24 by, and subject to the penalty provided under, section 711
25 of the Civil Rights Act of 1964.

1 **SEC. 14. REGULATIONS.**

2 (a) IN GENERAL.—Except as provided in subsections
3 (b), (c), and (d), the Commission shall have authority to
4 issue regulations to carry out this Act.

5 (b) LIBRARIAN OF CONGRESS.—The Librarian of
6 Congress shall have authority to issue regulations to carry
7 out this Act with respect to employees and applicants for
8 employment of the Library of Congress.

9 (c) BOARD.—The Board referred to in section
10 10(a)(3) shall have authority to issue regulations to carry
11 out this Act, in accordance with section 304 of the Con-
12 gressional Accountability Act of 1995 (2 U.S.C. 1384),
13 with respect to covered employees, as defined in section
14 101 of such Act (2 U.S.C. 1301).

15 (d) PRESIDENT.—The President shall have authority
16 to issue regulations to carry out this Act with respect to
17 covered employees, as defined in section 411(c) of title 3,
18 United States Code, and applicants for employment as
19 such employees.

20 **SEC. 15. RELATIONSHIP TO OTHER LAWS.**

21 This Act shall not invalidate or limit the rights, rem-
22 edies, or procedures available to an individual claiming
23 discrimination prohibited under any other Federal law or
24 regulation or any law or regulation of a State or political
25 subdivision of a State.

1 **SEC. 16. SEVERABILITY.**

2 If any provision of this Act, or the application of the
3 provision to any person or circumstance, is held to be in-
4 valid, the remainder of this Act and the application of the
5 provision to any other person or circumstances shall not
6 be affected by the invalidity.

7 **SEC. 17. EFFECTIVE DATE.**

8 This Act shall take effect on the date that is 6
9 months after the date of enactment of this Act and shall
10 not apply to conduct occurring before the effective date.

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